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2007]

WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA
v. DEP: CONSIDERING THE PARAMETERS OF THE
DELIBERATIVE PROCESS PRIVILEGE
IN THE EHB SETTING

I. INTRODUCTION

The “plot” of a typical deliberative process privilege battle played out recently in *Waste Management Disposal Services of Pennsylvania, Inc. v. Department of Environmental Protection* (*Waste Management*).¹ In an appeal to the Pennsylvania Environmental Hearing Board (EHB or the Board) from the Department of Environmental Protection’s (DEP or the Department) decision to deny a permit modification application, plaintiff Waste Management Disposal Services of Pennsylvania, Inc. (WMI) requested production of three DEP e-mails concerning a relevant provision of the Pennsylvania Code.² When the DEP claimed the deliberative process privilege and declined to produce the e-mails, WMI made a motion to compel in camera review.³

The deliberative process privilege, long recognized in some form in United States jurisprudence, protects some government documents from access by the parties and the public.⁴ The privilege is controversial because it can become entangled with fric-

1. See *Waste Mgmt. Disposal Servs. of Pa., Inc. v. Dep’t of Env’tl. Prot.*, EHB Docket No. 2004-236-K, 2005 WL 3872353 (Pa. Env. Hrg. Bd. Feb. 14, 2005) (corrected copy issued Feb. 15, 2005) (deciding question of in camera review related to deliberative process privilege claim) [hereinafter *WMI I*]; *Waste Mgmt. Disposal Servs. of Pa., Inc. v. Dep’t of Env’tl. Prot.*, EHB Docket No. 2004-236-K, 2005 WL 3872354 (Pa. Env. Hrg. Bd. Feb. 22, 2005) (containing opinion and motion to compel production of e-mails after in camera review) [hereinafter *WMI II*].

2. See *WMI I*, 2005 WL 3872353 at **1-2 (prefacing opinion with basic facts about discovery procedure); 25 PA. CODE § 273.202(a)(16)(1) (2006) (recodifying 25 PA. CODE § 273(a)(16)(i)) (prohibiting municipal waste landfills within certain conical area of runway flight paths). The code provision describes flight runways that “are or will be used by turbine-powered or piston-type aircraft during the life of disposal operations under the permit.” *Id.*

3. See *WMI I*, 2005 WL 3872353 at **1-2 (explaining DEP’s position and reason for denial of e-mails during discovery). While there are many types of privileges in various legal proceedings, for the purposes of this paper, “privilege” will refer to the “deliberative process privilege” unless otherwise specified.

4. See Kirk D. Jensen, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 563-65 (1999) (explaining basic history and purpose of deliberative process privilege).

152 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

tional constitutional principles.⁵ The privilege affirms the separation of powers, the concept that each governmental branch is, to some extent, insulated and autonomous from the other branches.⁶ If the privilege prevents litigants from accessing administrative documents, it also prevents the judicial branch from reviewing particular aspects of administrative decision-making.⁷

Conversely, the privilege may interfere with an individual litigant's constitutional due process rights.⁸ Although some administrative decisions should sensibly be off-limits to the public for either their sensitive content or because revealing decision-making documents may "chill" internal deliberations, courts must balance the government's need for privilege against a requesting party's due process rights.⁹ Ensuring due process may require the presentation of evidentiary materials sought to be protected by the government.¹⁰

5. See Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 IND. L.J. 845, 857 (describing competing, Constitution-based conflicts inherent in deliberative privilege). Wetlaufer colorfully states:

The music in this drama is provided by two competing choruses, one singing "The Urge to Secrecy" and the other, "The Ode to Democracy and Accountability." These choruses celebrate the competing values that are at stake in this controversy, and they vary in their relative strength from one time and place to another.

Id. (citations omitted). But see Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769, 1770 (2005) (stating that deliberative process privilege is uncontroversial compared to other government privileges).

6. See, e.g., *United States v. Nixon*, 418 U.S. 683, 703-13 (1974) (addressing meaning of presidential executive privilege in light of separation of powers doctrine).

7. See Kennedy, *supra* note 5, at 1802 (discussing separation of powers and interference between branches due to deliberative process privilege). Kennedy's article discussed various proposals to reform the privilege given its varying rationales. See *id.* at 1799-1815. See also *City of Colorado Springs v. White*, 967 P.2d 1042, 1047-48 (Colo. 1998) (differentiating between two "branches" of "executive privilege"). Some commentators characterize the "sensitive content" branch of the privilege as being reserved for presidential communications and state secrets. See *id.* These commentators call this the "constitutional" branch. See *id.* See also Russell L. Weaver & James T.R. Jones, *The Deliberative Process Privilege*, 54 MO. L. REV. 279, 288-90 (1989) (describing roots of privilege and noting lower courts treat "mental process" branch of privilege as constitutionally-based).

8. See U.S. CONST. amend. V (providing due process of law); U.S. CONST. amend. XIV, § 1 (providing right to due process through states). See also Wetlaufer, *supra* note 5, at 892 (describing individual litigant's evidentiary losses due to deliberative privilege).

9. See *Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827, 854 (3d Cir. 1995) (noting parties' interests must be balanced in determining whether deliberative process privilege applies).

10. See *Joseph J. Brunner, Inc. v. Dep't of Env'tl. Prot.*, EHB Docket No. 2002-304-L, 2004 WL 817746, at **1-3 (Pa. Env. Hrg. Bd. Apr. 6, 2004) (formulating

In the course of the WMI litigation, the Board issued two opinions that dealt specifically with the DEP's assertion of the deliberative process privilege.¹¹ In the first *Waste Management* opinion (*WMI I*),¹² the Board examined the nature of the privilege and granted in camera review.¹³ In the second *Waste Management* opinion (*WMI II*),¹⁴ the Board found that particular e-mail exchanges determining the application of a DEP regulation to an individual permittee were not privileged.¹⁵ Collectively, *WMI I* and *WMI II* provided thorough analysis of the deliberative process privilege in Pennsylvania and showed why the EHB court procedure particularly requires fair evidentiary access to the DEP documents.¹⁶

This Note provides an overview of the deliberative process privilege, examines the current state of the privilege in Pennsylvania and addresses the adverse impact a broadly-defined privilege would have on EHB proceedings.¹⁷ Section II discusses the relevant facts of the case and the parties' arguments.¹⁸ Section III outlines the history and nature of the deliberative process privilege through federal, Pennsylvania state and EHB case law.¹⁹ Section IV establishes the reasoning of *WMI I* and *WMI II*.²⁰ Section V analyzes *WMI I* and *WMI II* in relationship to the positives and negatives of applying the privilege to decisions made at lower administrative levels.²¹ Section VI considers the most current views of the privilege in Pennsylvania

position that invariable deliberative process privilege would deny basic due process rights to participants in EHB trial).

11. See *Waste Mgmt. Disposal Servs. of Pa., Inc. v. Dep't of Env'tl. Prot.*, EHB Docket No. 2004-236-K, 2005 WL 3872378, at *2 n.1 (Pa. Env. Hrg. Bd. May 18, 2005) (summarizing deliberative process privilege discovery dispute and its resolution before trial).

12. EHB Docket No. 2004-236-K, 2005 WL 3872353 (Pa. Env. Hrg. Bd. Feb. 14, 2005) (corrected copy issued Feb. 15, 2005).

13. See *id.* at **1-2 (concluding in camera review was appropriate).

14. EHB Docket No. 2004-236-K, 2005 WL 3872354 (Pa. Env. Hrg. Bd. Feb. 22, 2005).

15. See *id.* at *2 (determining no privilege applied after in camera review).

16. See *WMI I*, 2005 WL 3872353 at **2-7 (giving overview of history and nature of deliberative process privilege); *WMI II*, 2005 WL 3872354 at *11 (explaining deliberative process privilege in light of special circumstances of EHB review).

17. For a discussion of the consequences of a broadly defined deliberative process privilege in the EHB, see *infra* notes 250-60 and accompanying text.

18. For the relevant facts of *Waste Management*, see *infra* notes 24-34 and accompanying text.

19. For a review of essential federal and state deliberative process privilege case law, see *infra* notes 35-163 and accompanying text.

20. For the EHB's reasoning in *WMI I* and *WMI II*, see *infra* 164-216 and accompanying text.

21. For a discussion of the impact the deliberative process privilege has at the lower administrative level, see *infra* 217-49 and accompanying text.

154 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

case law.²² This Note concludes that the Pennsylvania Supreme Court should officially adopt the privilege in order to settle confusion as to its existence in the state judicial process, but should be careful to distinguish situations in which the government's decision-making concerns a party who is contesting the decision itself.²³

II. FACTS

In 2004, WMI applied to the DEP for a major permit modification seeking a vertical expansion of the company's landfill located in Pottstown, Montgomery County, Pennsylvania.²⁴ The DEP declined to grant the modification, informing WMI of its decision by letter dated October 13, 2004.²⁵ The DEP concluded that WMI failed to demonstrate it would comply with a section of the Pennsylvania Code prohibiting the operation of landfills within certain distances of certain runway flight paths.²⁶ WMI appealed the denial to the EHB.²⁷ During discovery, WMI requested production of three e-mails, all of which the DEP refused to produce.²⁸ WMI then filed a motion to compel in camera inspection of the e-mails.²⁹

In *WMI I*, the DEP argued that in camera review was inappropriate because the e-mails were protected by the deliberative process privilege.³⁰ The DEP supported its position through an affidavit describing the e-mails as "briefing memos," which "describe[d] the proposed action, matters of law and policy, outline[d] areas of disagreement both within and outside the Agency and ma[de] recommendations on the decision the Agency must

22. For a discussion of the limited deliberative process privilege in Pennsylvania case law, see *infra* 250-60 and accompanying text.

23. For a discussion of the possibility of adopting a limited deliberative process privilege in Pennsylvania, see *infra* 250-60 and accompanying text.

24. See *WMI I*, EHB Docket No. 2004-236-K, 2005 WL 3872353, at **1-2 (Pa. Env. Hrg. Bd. Feb. 14, 2005) (corrected copy issued Feb. 15, 2005) (providing general background of case procedural history).

25. See *id.* at *1 (describing timeline of permit request and denial).

26. See *id.* (referring to portion of Code at center of permit issue); 25 PA. CODE § 273.202(a)(16) (1) (2006) (recodifying 25 PA. CODE § 273(a)(16)(i)) (containing airport-navigable airspace regulation).

27. See *WMI I*, 2005 WL 3872353 at **1-2 (noting both parties requested expedited EHB trial).

28. See *id.* (outlining DEP's refusal to comply with e-mail request). The DEP declined to produce the three e-mails and instead produced a privilege log containing "skeletal" information about the correspondence. See *id.* at *2.

29. See *id.* at *1 (considering and granting WMI's motion for in camera review of three e-mails).

30. See *id.* at *2 (stating DEP's position on in camera review).

make.”³¹ In sum, the e-mails interpreted the flight path regulation in light of WMI’s permit request.³² After consideration, the Board ordered in camera review in *WMI I*.³³ After reviewing the documents in camera, the Board ordered the DEP to produce the e-mails to WMI in *WMI II*.³⁴

III. BACKGROUND

A. History and Elements

Arising from the traditional concept of sovereign immunity, the deliberative process privilege protects the “internal deliberations” of government officials.³⁵ The privilege is based on (1) respect for the administrative process, (2) the importance of open department discussions in making quality decisions and (3) respect for the autonomy of high-level government decision-makers.³⁶ In sum, the application of the privilege is based either on the common

31. *See id.* (citing DEP’s reasoning contained in Sherman affidavit). According to the DEP, the e-mails contained (1) a statement of the DEP’s interpretation of the regulation, (2) a statement of WMI’s interpretation of the regulation, (3) an evaluation of the strengths and weaknesses of each interpretation and recommendations regarding the interpretations and (4) a statement of the comments received during the permit application process and a recommended resolution of the issues raised by the comments. *See id.*

32. *See WMI I*, 2005 WL 3872353 at *2 (summarizing affidavit swearing to contents of e-mails). The affidavit also stated the DEP relied on “briefing” memos to make decisions through open, free discussion and should therefore be treated as confidential. *See id.* The DEP claimed that the privilege applied not only to the substance of the e-mails but should extend to the identities of the persons participating in the discussions and the location of those discussions. *See id.* at *7.

33. *See id.* at *15 (ordering in camera review).

34. *See WMI II*, EHB Docket No. 2004-236-K, 2005 WL 3872354, at *2 (Pa. Env. Hrg. Bd. Feb. 22, 2005) (finding no deliberative process privilege for DEP to assert). The Department appealed this decision to the commonwealth court and sought a stay from the Board; the Board denied the request. *See Waste Mgmt. Disposal Servs. of Pa., Inc. v. Dep’t of Env’tl. Prot.*, EHB Docket No. 2004-236-K, 2005 WL 3872355, at *4 (Pa. Env. Hrg. Bd. Feb. 25, 2005). The Board then granted a brief stay until the commonwealth court determined if the Board’s order should be stayed pending appellate review, but the EHB trial occurred while the Department’s deliberative process appeal was in the commonwealth court. *See Waste Mgmt. Disposal Servs. of Pa., Inc. v. Dep’t of Env’tl. Prot.*, EHB Docket No. 2004-236-K, 2005 WL 3872378, at *2 n.1 (Pa. Env. Hrg. Bd. May 18, 2005) (noting deliberative process privilege issue was dropped from case). WMI decided to drop its discovery request for the e-mails because it felt it was more urgent to have the permit issue resolved quickly. *See id.* In the final adjudication, the Board found the Department’s interpretation of the Code provision proper. *See id.* at *29.

35. *See Weaver & Jones, supra* note 7, at 279-85 (establishing basic characteristics of deliberative process privilege).

36. *See Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 945-47 (Ct. Cl. 1958) (establishing importance of “frank discussion” between subordinates and chief decision-makers in administrative actions). *See also Kennedy, supra* note 5, at 1180 (calling Justice Reed’s justification for deliberative privilege

law principle that administrative departments cannot operate in a “fish bowl,” that is, exposed to public scrutiny, or on the constitutionally-based theory that certain high-level, sensitive communications simply must remain off-limits to the general public.³⁷

The deliberative process privilege may arise during court procedures, where the government is either a party or an entity holding evidence relevant to the litigation.³⁸ The privilege is also frequently invoked in the course of federal Freedom of Information Act (FOIA) requests, Pennsylvania’s Right to Know Act (RTKA) requests or through other states’ freedom of information laws.³⁹ If the government believes documents requested by a party are privileged and deserve confidential protection, the government has the burden of proving the deliberative process privilege applies.⁴⁰

Federal and state court decisions, definitions and exemptions contained in FOIA and the RTKA demonstrate the deliberative process privilege analysis.⁴¹ For the deliberative process privilege to ap-

“classic”); *United States v. Morgan*, 313 U.S. 409, 422 (1941) (protecting “mental processes” of Secretary of Agriculture).

37. See *City of Colorado Springs v. White*, 967 P.2d 1042, 1048 (Colo. 1998) (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975)) (explaining common law reasoning for protection of government agencies’ decision-making processes and noting constitutional and common law bases for privilege). See also *Weaver & Jones*, *supra* note 7, at 288-89 (noting that lower courts treat “mental processes” branch of privilege as though based on constitutional principles but current trend is towards treating privilege as common law based).

38. See *Kennedy*, *supra* note 5, at 1783-89 (outlining deliberative process privilege settings and applications).

39. See 5 U.S.C. § 552(b) (2000) (listing exceptions to federal freedom of information disclosure); 65 PA. STAT. ANN. § 66.1-66.9 (West 2002) (noting that it is Pennsylvania’s equivalent to federal FOIA). The purpose of freedom of information acts is to allow public access to government documents that qualify as “public records.” See 65 PA. STAT. ANN. § 66.2 (describing procedure for access to public records). The RTKA will play a tangential role in this Note’s discussion, for several important Pennsylvania cases address the privilege as it arises out of RTKA requests. For information on freedom of information statutes in other states, see Erin Hoffman, *The Deliberative Process Privilege in Kentucky*, 25 J. NAT’L ASS’N ADMIN. L. JUDGES 485 (2005) (discussing adoption of deliberative process privilege in Kentucky and describing privilege in various states’ “freedom of information” statutes).

40. See *Weaver & Jones*, *supra* note 7, at 300 (stating that initial burden of proving privilege falls on government agency). To counter demands for materials in adversarial situations, the government must list and describe the subject matter of all documents over which it claims the deliberative privilege, so that the party requesting the materials can challenge the privilege claim. See *id.* An affidavit attesting to the contents of the document must accompany the itemized listing. See *id.* The description of the claimed privilege contents is known as a Vaughn Index, after *Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C. Cir. 1975). See *id.* at 306.

41. See 5 U.S.C. § 552(b) (including nine exceptions to right to federal information); 65 PA. STAT. ANN. § 66.1 (defining “public record” that sets limits of attainable information). For an overview of the parts of the deliberative process, see *City of Colorado Springs v. White*, 967 P.2d 1042 (Colo. 1998) (establishing common

ply, the communication in question must first be “predecisional” in nature.⁴² This means it must be part of the deliberation “process” and cannot occur after the government department or agency has reached a final position or policy.⁴³ Second, the communication must be “deliberative,” meaning it must give recommendations or “express opinions on legal or policy matters.”⁴⁴ Factual material is not deliberative.⁴⁵

The EHB accepts the standard characteristics of deliberative process-protected government material, but finds the privilege requires meeting three specific predicates.⁴⁶ For the privilege to apply, the communications must be: “(1) intended to be confidential; (2) constitute deliberations in that the communications were made in the context of devising an institutional decision; and (3) relate to legal or policy matters.”⁴⁷

If the government proves the deliberative process privilege protects the materials at issue, the court must balance the government’s interest in preserving confidentiality against the requesting party’s need for the information.⁴⁸ The balancing test often favors

law existence of deliberative privilege in Colorado) and *Hamilton v. Verdow*, 414 A.2d 914 (Md. 1980) (discussing privilege through “executive privilege” lens).

42. See *Weaver & Jones*, *supra* note 7, at 290-95 (discussing meaning of “predecisional” communication).

43. See *id.* (stating protected communication must be predecisional); see also *City of Colorado Springs*, 967 P.2d at 1051 (citing *N.R.L.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)) (noting that predecisional materials are protected because quality of decision will be affected by communications reviewed by decision-makers at time decision is made). One signal that a communication might be predecisional is if the communication moves “upstream” from lower to higher officials. See *Weaver & Jones*, *supra* note 7, at 291-92 (explaining “upstream” and “downstream” terminology). Predecisional communications become non-confidential as they turn into actual decisions over time. See *id.* at 293-94.

44. See *Weaver & Jones*, *supra* note 7, at 296-98 (discussing what qualifies and disqualifies information as “deliberative”) and *Hoffman*, *supra* note 39, at 488 (explaining material must be part of consultative process and provide recommendations or opinions on legal matters in order to be deliberative).

45. See *Weaver & Jones*, *supra* note 7, at 297 (citing *EPA v. Mink*, 401 U.S. 73, 87-88 (1973)) (acknowledging “facts” to be separate from “deliberation”).

46. See *WMI I*, EHB Docket No. 2004-236-K, 2005 WL 3872353, at *7 (Pa. Env. Hrg. Bd. Feb. 14, 2005) (corrected copy issued Feb. 15, 2005) (citing *Joseph J. Brunner, Inc. v. Dep’t of Env’tl. Prot.*, EHB Docket No. 2002-304-L, slip op. at 4, 2004 WL 103130, at **2-3 (Pa. Env. Hrg. Bd. Jan. 8, 2004)) (listing three prerequisites for deliberative process privilege to apply).

47. See *id.* at *6 (citing *Joseph J. Brunner, Inc. v. Dep’t of Env’tl. Prot.*, EHB Docket No. 2002-304-L, slip op. at 4, 2004 WL 103130, at *2 (Pa. Env. Hrg. Bd. Jan. 8, 2004) (discussing three deliberative process privilege criteria).

48. See *Joseph J. Brunner, Inc. v. Dep’t of Env’tl. Prot.*, EHB Docket No. 2002-304-L, 2004 WL 103130, at **3-4 (Pa. Env. Hrg. Bd. Jan. 8, 2004) (analyzing balancing process); see also *Weaver & Jones*, *supra* note 7, at 315-19 (reviewing and validating deliberative process privilege balancing test).

158 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

the government because requested materials must be central to the issue under judicial review.⁴⁹ A court will not grant access to peripheral materials that do not relate to the heart of the litigation.⁵⁰ This requirement removes many documents from the litigants' potential access.⁵¹

B. Federal Case Law

Several federal cases established guiding concepts regarding the application of the deliberative process privilege in various contexts. *Kaiser Aluminum & Chemical Corp. v. United States (Kaiser Aluminum)*⁵² and *United States v. Morgan (Morgan IV)*⁵³ are seminal to the modern application of the deliberative process privilege.⁵⁴ In *Kaiser Aluminum*, the United States Court of Claims made the oft-cited statement that public policy favors "open and frank discussion between subordinate and chief concerning administrative action," thus justifying the need for the deliberative process privilege.⁵⁵ Allowing public access to the "administrative reasoning process" and thereby forcing administrative departments to operate in a "fish bowl" would be against the public interest.⁵⁶

49. See *Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827, 852 (3d Cir. 1995) (quoting *First Eastern Corp. v. Mainwaring*, 21 F.2d 465, 468 n.5 (D.C. Cir. 1994)) (weighing "relevance" as part of test to determine whether to grant deliberative process privilege).

50. *Contra* Kennedy, *supra* note 5, at 1771-72 (finding that "uncertainty" of "ad hoc" balancing test harms and undermines goals of deliberative process privilege).

51. See Wetlaufer, *supra* note 5, at 892 (finding "general deliberative privilege" most directly affects individual litigants denied access to documents). Wetlaufer notes that documents and testimony that "bear closely enough upon [a litigant's] case" would have been discoverable in the absence of the privilege. *Id.*

52. 157 F. Supp. 939, 946 (Ct. Cl. 1958).

53. 313 U.S. 409 (1941).

54. See *City of Colorado Springs v. White*, 967 P.2d 1042, 1047 (Colo. 1998) (discussing importance of early federal cases). Other essential cases include: *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.C. Cir. 1966); *N.R.L.B. v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); *Vaughn v. Rosen*, 523 F.2d 1126 (D.C. Cir. 1975); *United States v. Reynolds*, 345 U.S. 1 (1953); *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997). See *City of Colorado Springs*, 967 P.2d at 1947-48 (some citations omitted) (referencing various cases treating privilege).

55. See *Kaiser Aluminum*, 157 F. Supp. at 946 (citing need for open discussion in administrative action). The court referred to the deliberative process privilege as "executive privilege." See *id.* at 943. The court also found it unnecessary to examine the privileged document in camera, as this would create "an absolute right for judicial examination and determination of all evidence whose discovery the executive deemed contrary to public interest." *Id.* at 946.

56. See *Vaughn v. Rosen*, 523 F.2d 1136, 1146 (D.C. Cir. 1975) (comparing exposed administrative decision-making to operating in a fish bowl); *Kaiser Aluminum*, 157 F. Supp. at 941 (holding executive privilege applicable to intra-office documents if particular circumstances of case did not require overriding privilege).

The court noted, however, that the privilege is not absolute.⁵⁷ The demand's circumstances must be considered to determine if the production of the materials would injure the government's consultative function.⁵⁸ If the United States consents to being sued, "full disclosure of all facts in possession of either party to the litigation is normally desirable."⁵⁹ But when production of the materials would be contrary to the public interest, the materials should not be revealed.⁶⁰

Morgan IV addressed the type of deliberative protection afforded to agency heads.⁶¹ In the course of issuing a series of decisions, the U.S. Supreme Court held that the "mental processes" of agency heads cannot be probed.⁶² When the Secretary of Agriculture (Secretary) made administrative decisions based on the record and conferences with officers in the Department, the procedure resembled a judicial proceeding.⁶³ Probing the Secretary's decision-making process would interfere with his quasi-judiciary responsibilities.⁶⁴ Administrative departments were therefore "deemed collaborative instrumentalities of justice and the appropriate

57. See *Kaiser Aluminum*, 157 F. Supp. at 946 (finding inspection of certain government documents to be against public interest but not "absolutely").

58. See *id.* at 941 (clarifying that privilege is not absolute).

59. See *id.* at 944 (stating usual position that revelation of all facts is desirable).

60. See *id.* (excluding from full disclosure items contrary to public interest).

61. See *United States v. Morgan*, 313 U.S. 409, 422 (1941) (noting importance of allowing agency head to make decisions free from scrutiny).

62. See *id.* (establishing protection of "mental processes" of administrative departments). Four separate Supreme Court opinions, collectively comprising the "Morgan Doctrine," set forth several administrative law tenets, including the required procedure for hearings taking place within the administrative branch. See *Morgan v. United States*, 298 U.S. 468 (1936) (finding that administrator who decides adjudication must hear facts); *Morgan v. United States*, 304 U.S. 1 (1938) (defining requirements of administrative "full hearing"); *United States v. Morgan*, 307 U.S. 183 (1939) (reversing order of District Court granting distribution of court-paid funds to plaintiffs); *United States v. Morgan*, 313 U.S. 409 (1941) (placing "veil" over thought processes of decision-makers) [hereinafter *Morgan IV*].

The Secretary had issued an order setting maximum price rates for livestock. See *Morgan v. United States*, 304 U.S. 1, 15-17 (1938) (stating facts leading to challenge of decision of Secretary of Agriculture). In a series of opinions, the Supreme Court addressed whether the Secretary made an "informed decision" on the matter. See *id.* During discovery at the district court level, the market agencies were permitted to depose the Secretary and question him about his decision-making processes regarding the price-fixing plan. *Morgan IV*, 313 U.S. at 422. The market agencies questioned the Secretary on how he came to his decision and the type of consultation he had with subordinates. See *id.* The Supreme Court held the Secretary should not be subjected to this line of questioning. See *id.*

63. See *Morgan IV*, 313 U.S. at 422 (quoting *Morgan v. United States*, 298 U.S. 468, 480 (1936)) (comparing deliberative role of Secretary to process used by judges to decide cases).

64. See *id.* (noting that examining judge's mental process would destroy judicial responsibility).

160 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

independence of [the departments and the courts] should be respected by the other.”⁶⁵

The Supreme Court’s holding in *United States v. Nixon* (*Nixon*)⁶⁶ provides important perspective on the limits of the privilege when it is based on constitutional separation of powers.⁶⁷ The Supreme Court held the president did not possess an absolute immunity privilege within judicial processes.⁶⁸ The Court acknowledged the importance of the separation of powers, but held the judicial branch had an Article III duty to “do justice in criminal prosecutions.”⁶⁹ In short, “neither the doctrine of separation of powers, nor the need for [confidentiality of] high-level communications, without more, [could] sustain an absolute, unqualified Presi-

65. *See id.* (emphasizing need for administrative independence from judicial branch). Some commentators distinguish three separate types of deliberative privileges, including: (1) the “deliberative process privilege,” meant strictly to prevent chilling communications in the future; (2) the privilege afforded high officials with quasi-judicial roles (like the Secretary of Agriculture); and (3) presidential privilege, discussed in *United States v. Nixon*, 418 U.S. 683 (1974). *See* Wetlaufer, *supra* note 5, at 3 n.3 (identifying ten separate confidentiality privileges). Even if treated as separate privileges with separate justifications, the composite influences of *Kaiser*, *Morgan IV* and *Nixon* (and their progeny) impact every thread of deliberative privilege, whether the privileges are separated or clumped under one deliberative process privilege heading. Thus the executive branch’s deliberative process assertions may arise from its desire to prevent a “chilling effect,” but its motives could also be jealous guardianship from judicial review, a motive more akin to a constitutionally-based separation of powers theory of privilege.

66. 418 U.S. 683 (1974).

67. *See id.* at 703 (affirming denial of President Nixon’s motion to quash subpoena of materials relating to conspiracy to defraud United States).

68. *See id.* at 714-15 (upholding subpoena for in camera review of documents related to criminal investigation). A special prosecutor subpoenaed materials relating to the criminal prosecution of the Watergate scandal. *See id.* at 683. President Nixon moved to quash the subpoena in the District Court for the District of Columbia. *See id.* at 686. The Supreme Court granted certiorari to decide whether any presidential privileges prevailed over the need to conduct in camera review of the materials. *See id.*

It is important to note that there is some difference between the deliberative process privilege, “presidential communications privilege,” and other privileges. *See* Kennedy, *supra* note 5, at 1780-81. The presidential communications privilege applies specifically to presidential decision-making. *See id.* at 1782. *See also In re Sealed Case*, 121 F.3d 729, 754-55 (D.C. Cir. 1997) (setting forth heightened standard required to overcome presidential privilege). Although *Nixon* concerned the president’s deliberations and advisements, it is still relevant and influential in the deliberative process privilege realm for recognizing that most deliberative governmental privileges have limits. *See id.* at 742. In *Nixon*, the realm of privilege ended where a need for criminal prosecution began. *See id.* at 743.

69. *See Nixon*, 418 U.S. at 707 (referring to essential duty of judicial branch).

dential privilege of immunity from judicial process under all circumstances.”⁷⁰

C. Pennsylvania Commonwealth Court and Pennsylvania Supreme Court Cases

The existence of the deliberative process privilege in Pennsylvania is open to some debate.⁷¹ Three cases, *Commonwealth v. Vartan* (*Vartan*),⁷² *LaValle v. Office of General Counsel of the Commonwealth* (*LaValle*),⁷³ and *Tribune-Review Publishing Co. v. Department of Community and Economic Development* (*Tribune-Review*),⁷⁴ comprise the most current and relevant Pennsylvania opinions in this area of the law.⁷⁵ A fourth case, *Joe v. Prison Health Services* (*Joe*)⁷⁶ emphasizes the state’s overall disfavor of any evidentiary privileges.⁷⁷ Pennsylvania courts also rely on the Third Circuit decision in *Redland Soccer Club, Inc. v. Department of the Army of the United States*⁷⁸ for its adoption of a succinct list of factors to consider when deciding whether the privilege applies.⁷⁹ In balancing interests, a court should consider at least

- (i) the relevance of the evidence sought to be protected;
- (ii) availability of other evidence; (iii) the “seriousness” of the litigation and the issues involved; (iv) the role of the

70. See *id.* at 706 (asserting importance of criminal prosecution over president’s claim of absolute privilege). Because the communications did not deal with military or other secrets, the president’s claim of confidentiality failed. See *id.*

71. See *WMI I*, EHB Docket No. 2004-236-K, 2005 WL 3872353, at *6 (Pa. Env. Hrg. Bd. Feb. 14, 2005) (corrected copy issued Feb. 15, 2005) (side-stepping “ontological question” of existence of deliberative privilege by assuming DEP has right to exert one).

72. 733 A.2d 1258 (Pa. 1999).

73. 769 A.2d 449 (Pa. 2001).

74. 859 A.2d 1261 (Pa. 2004), *affg* 814 A.2d 1261 (Pa. Commw. Ct. 2003).

75. See *Commonwealth v. Vartan*, 733 A.2d 1258 (Pa. 1999) (holding that deliberative process privilege protected deliberations by members of Pennsylvania Supreme Court regarding decision to not build new courthouse); *LaValle v. Office of Gen. Counsel of the Commonwealth*, 769 A.2d 449 (Pa. 2001) (deciding privilege question based on RTKA terminology); *Tribune-Review Publ’g Co. v. Dep’t of Cmty. and Econ. Dev.*, 859 A.2d 1261, 1269 (Pa. 2004) (affirming commonwealth court decision but finding adoption of deliberative process privilege unnecessary); *Tribune-Review Publ’g Co. v. Dep’t of Cmty. and Econ. Dev.*, 814 A.2d 1261, 1264 (Pa. Commw. Ct. 2003) (establishing applicability of deliberative process privilege in commonwealth court).

76. 782 A.2d 24 (Pa. Commw. Ct. 2001).

77. See *id.* at 32 (finding deliberative process privilege inapplicable to requested prison health documents).

78. 55 F.3d 827 (3d Cir. 1995).

79. See *id.* at 854 (noting district court should consider various factors in balancing interests).

government in the litigation; [and] (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are not violable.⁸⁰

1. *Commonwealth v. Vartan*

Vartan is often cited as proof that the deliberative process privilege exists in Pennsylvania.⁸¹ The case involved a lease agreement between Vartan and the Administrative Office of Pennsylvania Courts (AOPC) for a piece of land on which Vartan was to build a courthouse.⁸² When the AOPC terminated the contract, Vartan initiated a breach of contract action with the Board of Claims.⁸³ The Board of Claims sustained preliminary objections from the AOPC and dismissed the complaint.⁸⁴ When Vartan appealed, the commonwealth court reversed and remanded.⁸⁵ During discovery on remand, Vartan issued a notice of deposition and a subpoena to former Chief Justice Nix.⁸⁶ The Board of Claims denied the AOPC's motion to quash the subpoena, and the commonwealth court dismissed the AOPC's petition for review.⁸⁷

The Pennsylvania Supreme Court then granted the AOPC's appeal petition and held that the deliberative process privilege "may be invoked to prohibit disclosure of the deliberations of the members of the Court regarding the signing of a lease and its termination."⁸⁸ The plurality opinion held that the Board of Claims erred

80. See *id.* (quoting *First Eastern Corp. v. Mainwaring*, 21 F.2d 465, 468 n.5 (D.C. Cir. 1994) (listing factors to consider when applying balancing test)).

81. See, e.g., LEONARD PACKEL & ANNE BOWEN POULIN, WEST'S PENNSYLVANIA PRACTICE, EVIDENCE, § 33 (2d ed.) (2005) (stating that Pennsylvania recognized deliberative process privilege in *Vartan*).

82. See *Commonwealth v. Vartan*, 733 A.2d 1258, 1260-61 (Pa. 1999) (establishing facts and procedural history).

83. See *id.* at 1261 (stating Vartan's argument to Board).

84. See *id.* (describing events leading up to litigation).

85. See *id.* (stating procedural history).

86. See *id.* (stating relevant portions of discovery process).

87. See *Vartan*, 773 A.2d at 1261 (reviewing procedural history).

88. See *id.* at 1266 (specifying narrow circumstance in which privilege applies). The court quashed the subpoena of Chief Justice Nix:

In light of this Court's constitutionally required duty to administer the courts, and in recognition of the public importance of an agreement to provide court house facilities, we hold that the deliberative process privilege may be invoked to prohibit disclosure of the deliberations of the members of the Court regarding the signing of a lease and its termination.

Id.

in failing to quash the subpoena of Chief Justice Nix.⁸⁹ The court began its analysis with a review of the essential characteristics of the privilege: (1) it is meant to benefit the public by ensuring that officials freely exchange their ideas; (2) it must be made before the deliberation is over; and (3) it must be part of the deliberative process by containing legal or policy matters not including facts.⁹⁰ The court cited the *Morgan IV* principle that the “mental processes” of high-level officials may not be probed.⁹¹ In summary, the court “recognize[d] the existence of a deliberative process privilege that protects confidential deliberations of law, or policymaking that reflects opinions, recommendations or advice.”⁹²

2. *LaValle v. Office of General Counsel of the Commonwealth*

In *LaValle*, the government exerted the deliberative process privilege to counter a RTKA request.⁹³ A group sued the Pennsylvania Department of Transportation (PennDot), alleging PennDot breached an automotive emissions testing contract.⁹⁴ The case settled out of court.⁹⁵ After settlement, PennDot denied several state senators RTKA access to an auditing report prepared by a consultant that was important to the settlement outcome.⁹⁶ The senators appealed through the state court system and ultimately received review by the Pennsylvania Supreme Court.⁹⁷

The Pennsylvania Supreme Court held that PennDot could invoke the privilege and refuse to turn over the requested documents.⁹⁸ The court primarily discussed what constituted a “public

89. See *id.* (noting Vartan failed to show that taking Chief Justice Nix’s deposition was necessary to case).

90. See *id.* at 1263-64 (citations omitted) (recognizing existence of deliberative process privilege consistent with privilege’s goals and purpose).

91. See *id.* at 1263 (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)) (calling *Morgan* protection of decision-making process “long recognized”).

92. See *Vartan*, 773 A.2d at 1265 (tailoring recognition of deliberative privilege). The opinion also addressed an argument that because judicial immunity from suit was inapplicable in this case, the deliberative process was equally inapplicable. See *id.* The court noted that judicial immunity prevents a suit from going forward *altogether*, although the deliberative process privilege does not completely prevent a litigant from proceeding with his or her action. See *id.* at 1265-66.

93. See *LaValle v. Office of Gen. Counsel of the Commonwealth*, 769 A.2d 449, 451-52 (Pa. 2001) (reviewing case facts); 65 PA. STAT. ANN. § 66.1 (containing RTKA requirements).

94. See *LaValle*, 769 A.2d at 451-52 (providing background information).

95. See *id.* at 451 (noting state eventually paid plaintiff Envirotech \$145 million in settlement of action).

96. See *id.* (reviewing case procedural history).

97. See *id.* at 454 (allowing appeal to determine whether report was public record under RTKA).

98. See *id.* at 460 (finding records not within purview of RTKA).

164 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

record” within the meaning of the RTKA.⁹⁹ The court interpreted the “public record” definition through deliberative process concepts, but stated: “this Court has not definitively adopted the deliberative process privilege” and “it is beyond the scope of the present opinion to do so.”¹⁰⁰ The court concluded the General Assembly did not want to submit internal deliberations to public exposure through RTKA requests.¹⁰¹

3. *Tribune-Review Publishing Co. v. Department of Community and Economic Development*

Tribune-Review is relevant for opinions issued in the Pennsylvania Commonwealth Court (*Tribune-Review I*) and the Pennsylvania Supreme Court (*Tribune-Review II*).¹⁰² The Tribune-Review Publishing Company made a RTKA request for all applications rejected by a Department of Community and Economic Development (DCED) grant program.¹⁰³ DCED denied the request, claiming the applications were not “public records” under the RTKA.¹⁰⁴ The commonwealth court initially decided the rejected applications were “public records” as defined by the RTKA.¹⁰⁵ On remand from the Pennsylvania Supreme Court following the *LaValle* decision, the commonwealth court reversed itself, in light of the *LaValle* interpretation of a RTKA “public record.”¹⁰⁶ The *Tribune-Review I* court asserted the importance of the deliberative process privilege, which “protects from disclosure documents containing ‘confidential delib-

99. See *LaValle*, 769 A.2d at 452 (focusing discussion on meaning of “public record”); see also 65 PA. STAT. ANN. § 66.1 (containing RTKA definitions).

100. See *LaValle*, 769 A.2d at 457-58 (citing Weaver & Jones, *supra* note 7, at 279-85) (stating policies informing deliberative privilege and work product doctrine are “useful” to construction of RTKA).

101. See *id.* (refusing to interpret RTKA to include deliberative materials of agency decision-making).

102. See *Tribune-Review Publ'g Co. v. Dep't of Cmty. and Econ. Dev.*, 859 A.2d 1261 (Pa. 2004) (affirming commonwealth court decision based on *LaValle*); *Tribune-Review Publ'g Co. v. Dep't of Cmty. and Econ. Dev.*, 814 A.2d 1261 (Pa. Commw. Ct. 2003) (accepting deliberative process privilege in commonwealth court).

103. See *Tribune-Review I*, 814 A.2d at 1262-63 (describing Tribune-Review's RTKA requests).

104. See *Tribune-Review II*, 859 A.2d at 1264 (stating DCED position that rejected contracts were not RTKA public records).

105. See *Tribune-Review I*, 814 A.2d at 1263 (noting court's initial decision that contracts were public records and explaining procedural remand to commonwealth court in light of *LaValle*). See also *Tribune-Review Publ'g Co. v. Dep't of Cmty. and Econ. Dev.*, 751 A.2d 689 (Pa. Commw. Ct. 2000) (comprising original commonwealth court decision).

106. See *id.* (citing *LaValle v. Office of Gen. Counsel of the Commonwealth*, 769 A.2d 449 (Pa. 2001)) (acknowledging Pennsylvania Supreme Court's interpretation of public records under RTKA).

erations of law or policymaking, reflecting opinions, recommendations, or advice.’”¹⁰⁷ Significantly, the court stated: “this Court adopts the deliberative process privilege.”¹⁰⁸

The Pennsylvania Supreme Court affirmed on appeal.¹⁰⁹ The court noted, however, that it was not necessary for the commonwealth court to have adopted the deliberative process privilege because the case could be decided on RTKA definitions alone.¹¹⁰ *Tribune-Review II* specifically declined to adopt the privilege, stating that “while we agree with the principles we articulated in *Vartan*, adoption of the deliberative process privilege would be superfluous in light of our construction of the definition of the phrase ‘public record’”¹¹¹

4. *Joe v. Prison Health Services*

In *Joe*, an inmate’s estate brought a negligence action against the City of Philadelphia and its prison health contractor, Prison Health Services, Inc.¹¹² The Court of Common Pleas of Philadelphia County granted the estate’s motion to compel production of a variety of healthcare-related documents.¹¹³ On appeal, the commonwealth court affirmed, finding the defendants did not establish the right to a variety of privileges, including the deliberative process privilege.¹¹⁴

The court noted “Pennsylvania law does not favor evidentiary privileges.”¹¹⁵ Further, “[e]xceptions to the demand for every man’s evidence are not lightly created nor expansively construed,

107. See *id.* at 1263-64 (quoting *Commonwealth v. Vartan*, 733 A.2d 1258, 1263 (Pa. 1999)) (noting privilege protects discretion of agents and promotes inter- and intra-agency flow of information).

108. See *id.* at 1264 (emphasis added) (adopting deliberative process privilege).

109. See *Tribune-Review II*, 859 A.2d at 1269 (affirming order of commonwealth court).

110. See *id.* (finding documents to not be public records under RTKA, making adoption of deliberative process privilege unnecessary).

111. See *id.* (calling commonwealth court adoption of deliberative process privilege “superfluous”).

112. See *Joe v. Prison Health Services, Inc.*, 782 A.2d 24, 28 (Pa. Commw. Ct. 2001) (providing case background).

113. See *id.* (stating lower court holding).

114. See *id.* at 34-35 (affirming lower court decision concerning several privileges).

115. See *id.* at 31 (citing *Commonwealth v. Stewart*, 690 A.2d 195 (Pa. 1997)) (providing history of evidentiary privileges in Pennsylvania).

166 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

for they are in derogation of the search for truth.’”¹¹⁶ The court stated the deliberative process privilege should be narrowly construed and the government “must present more than a bare conclusion or statement that the documents sought are privileged,” otherwise “the agency, not the court, would have the power to determine the availability of the privilege.”¹¹⁷ The defendants did not prove the documents represented a “deliberative process,” for the documents showed nothing more than an ongoing review of Prison Health’s performance.¹¹⁸

C. Pennsylvania Environmental Hearing Board Cases

The EHB functions as a trial court, hearing environmental cases arising out of DEP decisions.¹¹⁹ The EHB must conform to the provisions of the Environmental Hearing Board Act (EHB Act).¹²⁰ The EHB hears cases de novo in that a DEP decision is not final until the adversely-affected party has the opportunity to appeal the decision to the EHB.¹²¹ In *Department of Environmental Protection v. North American Refractories Co. (NARCO)*,¹²² the commonwealth court held the DEP has the power to interpret environmental regulations, while the EHB is limited to “determining whether the agency’s interpretation is consistent with the regulation and with the statute under which the regulation was promulgated.”¹²³

The commonwealth court distinguished the EHB/DEP relationship from the structures of “traditional agencies,” where adjudication may function as rulemaking.¹²⁴ For example, in

116. See *id.* (citing *Hutchinson v. Luddy*, 606 A.2d 905, 908 (Pa. Super. Ct. 1992)) (quoting *Herbert v. Lando*, 441 U.S. 153, 175 (1979)) (establishing state’s position on evidentiary privileges).

117. See *Joe*, 782 A.2d at 33-34 (citing *Redland Soccer Club, Inc. v. Dep’t of the Army*, 55 F.3d 827 (3d Cir. 1995)) (providing persuasive federal language based on Pennsylvania law).

118. See *id.* at 34 (finding defendant’s broad interpretation of deliberative privilege would shield any document evaluating performance of contractor).

119. See 35 PA. STAT. ANN. § 7514 (containing jurisdictional information on EHB).

120. See generally 35 PA. STAT. ANN. §§ 7511-16 (comprising EHB Act).

121. See 35 PA. STAT. ANN. § 7514(c) (setting forth rule regarding finality of DEP actions).

122. 791 A.2d 461 (Pa. Commw. Ct. 2002).

123. See *id.* at 464-65 (noting deferential precedent for administrative interpretations of DEP’s own regulations).

124. See *id.* at 465-66 (distinguishing traditional agencies from EHB/DEP relationship). The court summarized the branches of environmental protection in Pennsylvania as follows:

The EHB and the Department are two branches of the tripartite administrative structure. . . . The third branch of that structure is the Environ-

Commonwealth v. Public Utilities Commission (Public Utilities Commission),¹²⁵ the Public Utilities Commission (PUC) made tariff regulations and also handled a complaint based on those regulations.¹²⁶ In contrast, having been granted adjudicative authority only, the EHB must exercise “the type of nonpolicy-making adjudicatory powers typically exercised by a court in the agency-review context.”¹²⁷ In short, because the legislature insulated the EHB from the DEP and gave it “quasi-judicial” powers, “[t]he EHB’s duty is to determine if the Department’s actions can be sustained or supported by evidence taken by the EHB.”¹²⁸ Deferring to the DEP interpretations is “consistent with this duty.”¹²⁹ The role of “NARCO deference” in conjunction with the deliberative process privilege is essential to the *Waste Management* opinions.¹³⁰

1. *Lower Paxton v. Department of Environmental Protection*

In *Lower Paxton Township v. Department of Environmental Protection (Lower Paxton)*,¹³¹ Lower Paxton Township appealed the DEP’s denial of its Act 37 Water Plan (Plan).¹³² At issue was whether a particular water treatment technology could be used as part of the township’s Plan.¹³³ In the course of discovery, the DEP made a motion for a protective order based on the deliberative process privilege to prevent the deposition of the Deputy Secretary for Water Management (Deputy Secretary).¹³⁴

mental Quality Board (EQB). The Department is the executive branch, assigned various duties to implement and enforce environmental statutes and regulations. . . . The EHB is the judicial branch, empowered to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. Section 4 of the Environmental Hearing Board Act (EHB Act) . . . describes the EHB as “an independent quasi-judicial agency.” The EQB is the legislative branch, responsible for developing a master environmental plan for Pennsylvania and empowered to formulate, adopt and promulgate rules and regulations for the Department.

Id. (citations omitted).

125. 331 A.2d 598 (Pa. Commw. Ct. 1975).

126. *See id.* at 599-600 (describing tariff provisions and litigation procedure).

127. *See NARCO*, 791 A.2d at 466 (quoting *Martin v. Occupational Safety and Health Review Comm’n*, 499 U.S. 144, 154 (1991)) (providing support for limiting EHB role to review).

128. *See id.* (finding EHB deference to DEP interpretations to be consistent with job of reviewing DEP analysis of evidence on record).

129. *See id.* at 466 (defining role of EHB respecting DEP actions).

130. For analysis of the *WMI I* and *WMI II* opinions, see *infra* notes 163-248.

131. EHB Docket No. 200-169-K, 2001 WL 300060 (Pa. Env. Hrg. Bd. Mar. 7, 2001).

132. *See id.* at *1 (giving procedural background).

133. *See id.* (providing case background).

134. *See id.* (stating DEP’s basis for motion to Board).

168 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

The EHB denied the motion.¹³⁵ Under the EHB Act, an appellant has the right to a de novo EHB trial.¹³⁶ A DEP decision adversely affecting a party is not final until the EHB has heard the appeal.¹³⁷ It would therefore be “illogical to maintain that the core information about how and on what bases the Department arrived at its decision under review is to be locked away.”¹³⁸ It appeared the Deputy Secretary was “directly, significantly and persistently” part of the decision-making process ending in the denial of the township’s Plan.¹³⁹ The Board held that to disallow the Deputy Secretary’s deposition would lock away the core basis for the DEP’s decision.¹⁴⁰ “Review of and scrutiny of the Department’s deliberative process with respect to the action under appeal is a part of the very essence of the Appellant’s right and the Board’s function and duties. Application of the privilege . . . would render nugatory Appellant’s rights and the Board’s responsibilities.”¹⁴¹

2. *New Jersey DEP v. Pennsylvania DEP*

In *New Jersey Department of Environmental Protection v. Pennsylvania Department of Environmental Protection (NJDEP)*,¹⁴² the EHB recognized the deliberative process privilege in conformance with the commonwealth court’s *Tribune-Review I* decision.¹⁴³ In response

135. See *id.* at *2 (dismissing DEP’s unsupported reliance on *Vartan* decision).

136. See *Lower Paxton*, 2001 WL 300060 at *3 (discussing provisions of EHB Act).

137. See *id.* (citing 35 PA. STAT. ANN. § 7514(c)) (emphasizing need for Board to hear appeal before adverse Department action can take effect). For an overview of the Environmental Hearing Board, see William Hoffman & Steven Horst, *The EHB: DEP’s Friend or Foe? Environmental Hearing Board Review*, 15 VILL. ENVTL. L.J. 173 (2004) (providing background to creation of EHB).

138. See *Lower Paxton*, 2001 WL 300060 at *3 (stating favorability of EHB’s ability to review DEP decisions). The Board stated, “[i]t is hard to imagine a setting which is more antithetical to application of a deliberative process privilege.” *Id.*

139. See *id.* at *1 (describing role of Deputy Secretary in permit process according to deposition of Department employee). *Lower Paxton* also rejected the Department’s reliance on *Vartan*. See *id.* at *3 (distinguishing from *Vartan* emphasis on judicial role). The *Lower Paxton* court found that *Vartan* contained facts “peculiar to that case.” *Id.* at *2. The Pennsylvania Supreme Court had analogized the inquiry into Chief Justice Nix’s decision-making process to the immunity judges have regarding their judicial activities. See *id.* at *2. But in *Lower Paxton*, the Deputy Secretary “[was] not within that ambit.” *Id.* at *2.

140. See *id.* at *3 (finding inability to access information illogical).

141. See *id.* (noting relevance of deliberative privilege to both appellant and Board).

142. EHB Docket No. 2001-280-C, 2003 WL 91359 (Pa. Env. Hrg. Bd. Feb. 21, 2003).

143. See *id.* at *5 (citing *Tribune-Review Publ’g Co. v. Dep’t of Cmty. and Econ. Dev.*, 814 A.2d 1261 (Pa. Commw. Ct. 2003)) (considering supplemental briefing

to certain discovery requests, the New Jersey Department of Environmental Protection (NJDEP) asserted the deliberative process privilege.¹⁴⁴ The EHB declined to find that the *Tribune-Review I* and *LaValle* decisions were limited to RTKA requests because the cumulative effect of those and other cases showed the “Commonwealth Court intended to recognize a more generally-applicable evidentiary privilege which extends beyond the confines of public documents law.”¹⁴⁵

In an extended footnote, however, the EHB emphasized the privilege was not asserted by the *Pennsylvania* DEP but rather by the *New Jersey* DEP.¹⁴⁶ The EHB noted “there clearly remains a question whether the deliberative process privilege may be properly asserted by the [Pennsylvania DEP] in a Board proceeding, given the conflict between the privilege and the Board’s statutory duty to review [the Pennsylvania DEP’s] decision-making process.”¹⁴⁷ In the following cases, the EHB had the opportunity to examine the existence of the deliberative process privilege when asserted by the Pennsylvania DEP.

3. *Brunner I*

*Brunner, Inc. v. Department of Environmental Protection (Brunner I)*¹⁴⁸ involved a dispute over whether a statute required Brunner to pay a fee related to its landfill operation.¹⁴⁹ During discovery, Brunner requested and the DEP declined to produce certain memos, citing the deliberative process privilege, among other privileges.¹⁵⁰ The EHB granted Brunner’s motion to compel the DEP to produce the memos.¹⁵¹

in light of commonwealth court’s intervening opinion). *Tribune-Review II* was not yet before the Pennsylvania Supreme Court. *See id.*

144. *See id.* at *1 (explaining basis for motion to compel).

145. *See id.* at *8 (agreeing with NJDEP that distinction between RTKA requests and privilege asserted in case was insignificant).

146. *See id.* at *13 n.9 (emphasizing nature of deliberative process privilege assertion).

147. *See NJDEP*, 2003 WL 913519 at *13 n.9 (citations omitted) (raising essential question of scope of EHB review of DEP decisions). *NJDEP* was decided before *NARCO*. The EHB expressed no opinion regarding whether recent cases provided adequate authority for the DEP to assert the privilege in an EHB proceeding. *See id.*

148. EHB Docket No. 2002-304-L, 2004 WL 103130 (Pa. Env. Hrg. Bd. Jan. 8, 2004).

149. *See id.* at *1 (briefing factual issue before court).

150. *See id.* at *2 (reasoning that deliberative process privilege may be asserted in proceedings before Board).

151. *See id.* at *1 (noting DEP’s objections to Brunner’s request to produce). Decided after the *Tribune-Review* commonwealth court decision but before its ap-

170 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

The EHB found that if a party is able to present a credible showing of need, the EHB will apply a two-step analysis: (1) if the EHB finds the communication qualifies for the privilege, it will (2) balance, on a case-by-case basis, the party's interest in the documents against the DEP's need for confidentiality.¹⁵² The Board emphasized that the deliberative process privilege is "qualified," in contrast to privileges that apply regardless of whether the protected information might have been dispositive.¹⁵³ The EHB therefore had to weigh the importance of the evidence to the appellant against the effect of disclosure on "frank and independent discussion" within the DEP.¹⁵⁴ The court held the DEP could assert the

peal, remand, reversal and second appeal to the Pennsylvania Supreme Court, the EHB allowed the DEP to assert the deliberative process privilege because the privilege appeared to be under active review by the Pennsylvania Supreme Court. *See id.* at *2. *Brunner I* did note a current Board trend toward recognizing the privilege, representing a departure from an historic disinclination to recognize its existence. *See id.* at *2 (citing *F.A.W. Associates v. Dep't of Env'tl. Res.*, EHB Docket No. 90-228-B (consolidated docket), 1990 WL 263908 (Pa. Env. Hrg. Bd. Dec. 31, 1990); *City of Harrisburg v. Dep't of Env'tl. Res.*, EHB Docket No. 88-120-F, 1990 WL 270894 (Pa. Env. Hrg. Bd. May 30, 1990); *New Jersey Dep't of Env'tl. Prot. v. Pennsylvania Dep't of Env'tl. Prot.*, EHB Docket No. 2001-280-C, 2003 WL 91359, at *1 n.2 (Pa. Env. Hrg. Bd. Feb. 21, 2003)) (using trend toward acceptance of privilege to support opinion).

152. *See id.* at *2 (citing *Commonwealth v. Vartan*, 733 A.2d 1258, 1263 (Pa. 1999); *Lower Paxton Twp. v. Dep't of Env'tl. Prot.*, EHB Docket No. 200-169-K, 2001 WL 300060 (Pa. Env. Hrg. Bd. Mar. 7, 2001); *New Jersey Dep't of Env'tl. Prot. v. Pennsylvania Dep't of Env'tl. Prot.*, EHB Docket No. 2001-280-C, 2003 WL 91359 (Pa. Env. Hrg. Bd. Feb. 21, 2003)) (providing basic deliberative process privilege steps).

153. *See Brunner I*, 2004 WL 103130 at *5 (comparing qualified deliberative process privilege to absolute attorney-client privilege).

154. *See id.* at *4 (describing elements on each side of balancing test). To determine whether the evidence is very important to the appellant, the Board listed these probing questions:

To what extent does the communication contain information that is relevant to the appellant's case? Is the same information available from other sources? What is the quality of those alternative sources, if they exist? Is the information unnecessarily cumulative or does it add obvious value? Is the communication specific to the appellant, which would weigh heavily in favor of allowing disclosure, or more generic in nature?

Id. Regarding elements which would make protecting the DEP's internal communications more important than allowing its contents as evidence, the court listed the following:

- [x] Confidentiality
- [x] Deliberations
- [x] Context - connection to a decision or action
- [x] Opinion, advice, etc. v. facts
- [x] Law or policy
- [x] Relevance
- [x] Sensitivity

In analyzing these factors, we will consider all pertinent facts, including the who, what, where, when, why, and how of the communication.

Id. at *5.

deliberative process privilege, but the Board ordered in camera review to determine whether the privilege applied.¹⁵⁵

4. *Brunner II*

In *Brunner, Inc. v. Department of Environmental Protection (Brunner II)*,¹⁵⁶ the Board applied its *Brunner I* deliberative process privilege test to discussions involving only a few highly placed employees.¹⁵⁷ The discussions concerned the state-wide implications of a new statute.¹⁵⁸ The employees involved in the discussions intended to propose an official DEP interpretation of the statute to the DEP Secretary's office.¹⁵⁹ Based on these characteristics, the deliberations fell within the scope of the privilege and satisfied the "deliberations" prong of the test.¹⁶⁰

The documents failed the second prong, however, because the DEP's interest in maintaining a "free exchange of ideas" did not outweigh Brunner's interest in accessing the requested deliberative information.¹⁶¹ First, the case turned on the meaning of the statute — if the Board could not determine the legislative intent from the statute facially, the DEP's interpretation would be probative evidence of the statute's meaning.¹⁶² Second, this information would be highly relevant to Brunner, who had the right to challenge and contradict the DEP's statutory interpretation.¹⁶³

155. *See id.* at *5 (requiring DEP to submit materials to Board for in camera inspection).

156. EHB Docket No. 2002-304-L, 2004 WL 817746 (Pa. Env. Hrg. Bd. Apr. 6, 2004).

157. *See id.* at *2 (finding responses given at depositions of DEP officials not protected by deliberative process privilege). The DEP sought to prevent the depositions of two DEP officials from being taken. *See id.* at *1.

158. *See id.* (describing nature of intradepartmental discussions). In other words, the discussions were not about one particular site or set of facts. *See id.*

159. *See id.* (describing intentions behind discussions).

160. *See id.* (applying deliberative process privilege test and finding information could meet privilege requirements).

161. *See Brunner II*, 2004 WL 817746 at *3 (disagreeing with Department's claim that discussions had no probative value).

162. *See id.* (finding internal discussions to be critical evidence).

163. *See id.* (discussing Brunner's general entitlement to exploring all pertinent aspects of evidence).

IV. NARRATIVE ANALYSIS

A. *WMI I* Analysis

1. *In Camera* Review and the Deliberative Process Privilege in Pennsylvania

In *WMI I*, the EHB recognized its job was simply to decide whether to grant in camera review of the e-mails involved in the deliberative process privilege question.¹⁶⁴ To properly address this issue, the EHB first discussed the state of the deliberative process privilege in Pennsylvania.¹⁶⁵ The Board noted that although the commonwealth court adopted the privilege in *Tribune-Review I*, the commonwealth court relied on *Vartan*, which was a plurality opinion, and *LaValle*, in which the Pennsylvania Supreme Court explicitly declined to adopt the privilege.¹⁶⁶ The Board nevertheless concluded that so long as the commonwealth court recognized the deliberative process privilege, the privilege could be asserted before the EHB.¹⁶⁷

2. *Deliberative Process Privilege Standard*

The EHB next reviewed whether the DEP could assert the deliberative process privilege and whether it precluded in camera review.¹⁶⁸ Relying heavily on *Brunner I* and *Brunner II*, the EHB stated that the privilege applies to communications that are intended to be confidential, constitute deliberations and relate to legal or policy matters.¹⁶⁹ The burden of proof is on the party asserting the privilege, and the privilege is not absolute, but qualified.¹⁷⁰ Based on

164. See *WMI I*, EHB Docket No. 2004-236-K, 2005 WL 3872353, at *3 (Pa. Env. Hrg. Bd. Feb. 14, 2005) (corrected copy issued Feb. 15, 2005) (preparing to rule on motion by stating court's essential task).

165. See *id.* (referring to deliberative process privilege discussion as "detour" from in camera review question).

166. See *id.* at **4-5 (noting adoption of privilege by commonwealth court while addressing contradictory dicta issued by Pennsylvania Supreme Court). The court also noted that in *Tribune-Review II* the Pennsylvania Supreme Court "did not deny its existence or preclude its application . . . [it] merely said it had not adopted it." *Id.* at *5 (citing *Tribune-Review Publ'g Co. v. Dep't of Cmty. and Econ. Dev.*, 859 A.2d 1261, 1269 (Pa. 2004)).

167. See *id.* at *6 (declining to delve into "ontological" question of existence of privilege while following *Brunner* holding that privilege may be asserted).

168. See *id.* at **6-7 (finding DEP's claim to privilege beyond proper scope).

169. See *WMI I*, 2005 WL 3872353 at *6 (citing *Joseph J. Brunner, Inc. v. Dep't of Envtl. Prot.*, EHB Docket No. 2002-304-L, 2004 WL 103130, at *4 (Pa. Env. Hrg. Bd. Jan. 8, 2004)) (outlining essential deliberative process privilege elements).

170. See *id.* at *7 (citing *Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827, 854 (3d Cir. 1995); *Brunner I*, 2004 WL 103130 at *6; *Lower Paxton Twp. v. Dep't of Envtl. Prot.*, EHB Docket No. 200-169-K, 2001 WL 300060, at *3 (Pa. Env. Hrg.

these predicates, the EHB found the DEP's claim that the privilege applied to general policy decisions as well as to "communications on the subject of the particular Department action under review at the Board" to be too broad and all-encompassing.¹⁷¹

3. *In Camera Review Standard*

The EHB next addressed the standard for in camera review.¹⁷² The EHB found in camera review appropriate in many potentially privileged situations but acknowledged it may intrude on the deliberative privilege if the privilege may be asserted.¹⁷³ The party challenging the privilege must show that (1) the documents are not subject to the privilege and (2) the party's need for the information "outweighs the government's need to keep the information secret."¹⁷⁴ The Board found WMI established the e-mails might not be privileged, making in camera review for "further evaluation of the claim of privilege" appropriate.¹⁷⁵ As the e-mails appeared to relate to the specific matter of WMI's permit denial, it was "'hard to imagine a setting . . . more antithetical to [the] application of the deliberative process privilege.'"¹⁷⁶

Most importantly, the EHB noted that it had to provide a trial that met due process requirements.¹⁷⁷ If the Board did not review the e-mails to determine whether they contained legal or policy matters, "there would be no due process and the rights [to a due

Bd. Mar. 7, 2001)) (noting privilege can be outweighed by opposing party's interest in disclosure and including crucial question of burden of proof in deliberative process privilege overview).

171. *See id.* at *7 (refuting Department's broad privilege claim and noting irony of broad claim in light of Pennsylvania Supreme Court's recent reminder that it has never adopted privilege).

172. *See WMI I*, 2005 WL 3872353 at *5-6 (noting in camera review must not be automatic).

173. *See id.* at **13-14 (citing *City of Colorado Springs v. White*, 967 P.2d 1042, 1053-54 (Colo. 1998); *Killington, Ltd. v. Lash*, 572 A.2d 1368, 1375-76 (Vt. 1990); *State ex rel. Attorney Gen. v. First Judicial Dist. Court*, 629 P.2d 330, 334 (N.M. 1981); *Hamilton v. Verdow*, 414 A.2d 914, 926-27 (Md. 1980)) (explaining in camera review considerations and noting that in camera review alone can violate legitimate deliberative process privilege).

174. *See WMI I*, 2005 WL 3872353 at *9 (citations omitted) (giving standard for showing necessity of in camera review).

175. *See id.* at *10 (finding WMI presented prima facie or credible claim that e-mails may not be entirely privileged).

176. *See id.* at *1 (quoting *Lower Paxton Twp. v. Dep't of Envtl. Prot.*, EHB Docket No. 200-169-K, 2001 WL 300060, at *3 (Pa. Env. Hrg. Bd. Mar. 7, 2001)) (discussing role of EHB in DEP matters and importance of access to DEP decisional materials given job of reviewing DEP decisions in adjudicative setting).

177. *See id.* at *11 (noting EHB provides due process trial of "the Department's specific decision on its specific matter").

174 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

process trial] granted under the Environmental Hearing Board Act" would disappear.¹⁷⁸

Even if the documents warranted deliberative process privilege protection, WMI's need for the e-mails outweighed the DEP's interest in keeping them confidential.¹⁷⁹ The DEP's interpretation of the "runway flight path exclusionary regulation" was highly relevant in determining whether WMI's permit was properly denied because the e-mails potentially contained relevant, probative evidence central to EHB review.¹⁸⁰ Assuming the EHB would apply *NARCO* deference to the DEP's interpretation of the runway flight exclusion, every available piece of evidence would be crucial to WMI's presentation of its case.¹⁸¹

B. WMI II Analysis

After in camera review of the three e-mails, the EHB in *WMI II* determined the documents were not privileged because they did not pertain to "legal or policy matters."¹⁸² Even if the documents were covered by the privilege, the Board found WMI was entitled to disclosure of the documents under the balancing test.¹⁸³ The Board proceeded to discuss the deliberative process privilege standard of review outlined in *WMI I*.¹⁸⁴ The EHB noted its *WMI II* decision should be read together with its *WMI I* decision.¹⁸⁵ Citing

178. *See id.* (addressing potential mistake of denying due process in favor of deliberative process privilege). If the e-mails contained any legal or policy matters, a partial redaction might instead be appropriate. *See id.*

179. *See WMI I*, 2005 WL 3872353 at *15 (discussing application of "interest" prong of in camera review standard).

180. *See id.* (citing *Joseph J. Brunner, Inc. v. Dep't of Env'tl. Prot.*, EHB Docket No. 2002-304-L, 2004 WL 817746, at **5-7 (Pa. Env. Hrg. Bd. Apr. 6, 2004)) (explaining relevance of DEP's interpretation of regulation to *WMI I* and comparing in camera review standard applied in *Brunner II* to *WMI I* application).

181. *See id.* at *14 (describing escalating need for probative evidence about DEP decision-making as more agency deference is applied during EHB review). The opinion did not disavow the DEP's claim that allowing disclosure would prevent free and open discussion in its decision-making. *See id.*

182. *See Waste Mgmt. Disposal Servs. of Pa., Inc. v. Dep't of Env'tl. Prot.*, EHB Docket No. 2004-236-K, 2005 WL 3872354, at *1 (Pa. Env. Hrg. Bd. Feb. 22, 2005) (declining to find privilege in DEP documents).

183. *See id.* at **12-13 (applying balancing test).

184. *See id.* at **2-3 (referring to deliberative process privilege elements as "predicates" and reviewing balancing portion of deliberative process privilege test). A court must first determine whether the "predicates for the privilege are present," then apply the balancing test. *See id.* at *2.

185. *See id.* at *1 (explaining complimentary relationship of *WMI I* and *WMI II*). After *WMI I*, the Board offered the parties the opportunity to request any other proceedings they might want. *See id.* at **1-2. WMI did not submit a further brief and did not request an evidentiary hearing. *See id.* The DEP submitted a supplemental brief but did not request any other proceedings. *See id.*

Joe, the Board also emphasized the need to construe the privilege narrowly.¹⁸⁶

The Board described the contents of the e-mails as a “detailed recitation of the legal position of the Department” regarding the interpretation of the runway flight exclusion.¹⁸⁷ The e-mails provided a “foundation” for the Department’s interpretation of the regulation and the reasons it would not accept WMI’s interpretation.¹⁸⁸ The e-mails “[were] not diological but monological.”¹⁸⁹ They were not a “give and take” between two persons in the course of developing an interpretation of the runway exclusionary flight regulation.¹⁹⁰ The e-mails simply applied the regulation to WMI’s situation.¹⁹¹ The e-mails therefore did not develop an interpretation but instead made a reasoned statement.¹⁹²

The Board next analyzed each “predicate” necessary to find the deliberative process privilege — the items must be confidential, deliberative and concern legal or policy matters.¹⁹³ First, the Board determined that the Department “just barely” met the “confidentiality” predicate.¹⁹⁴ Although marking a document “confidential” does not automatically make it so, the DEP offered evidence that suggested the series of three e-mails was not intended for broad publication.¹⁹⁵

Second, the Board found the e-mails met the “deliberative or deliberations” predicate of the privilege.¹⁹⁶ The e-mails showed careful consideration, showed the author was trying to avoid error, reflected careful thought and reflected consultations with others.¹⁹⁷ The Board stressed, however, that the e-mails did not “deliberate”

186. *See id.* at *3 (citing *Joe v. Prison Health Servs., Inc.*, 782 A.2d 24, 33 (Pa. Commw. Ct. 2001)) (emphasizing Pennsylvania’s narrow take on evidentiary privileges).

187. *See WMI II*, 2005 WL 3872354 at *3 (describing contents of DEP e-mails).

188. *See id.* (describing foundational quality of e-mails).

189. *See id.* (describing monologue quality of e-mails).

190. *See id.* at *3 (calling e-mails recitation of regulation’s application rather than interpretive exchange of ideas).

191. *See id.* at *5 (describing singular application of e-mails).

192. *See WMI II*, 2005 WL 3872354 at *5 (describing statement-like qualities of DEP e-mails).

193. *See id.* at **2-12 (containing “predicates” analyses).

194. *See id.* at **3-4 (applying confidentiality predicate).

195. *See id.* at *4 (finding minimal requirements for confidentiality predicate).

196. *See id.* at *5 (applying deliberative or deliberations predicate).

197. *See WMI II*, 2005 WL 3872354 at *5 (describing evidence of careful thought in e-mails).

176 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

or “interpret” the airport runway exclusion.¹⁹⁸ Rather, the e-mails deliberated the regulation’s application to the WMI landfill.¹⁹⁹

Third, the Board found the e-mails did *not* meet the “legal and policy matters” predicate of the privilege.²⁰⁰ This predicate does not provide “blanket coverage” to communications concerning a particularized Department decision but instead protects “broad, general policy and legal discussions.”²⁰¹ The Board found the e-mails “so site specific” that they could not fairly fit the privilege.²⁰² Quoting extensively from *WMI I* and contrasting the e-mails with the communications in *Brunner II*, the EHB found the substance of the e-mails to be “one hundred percent within this very case.”²⁰³ The e-mails did not discuss any rule or statute generally and did not contain a “dialogical discussion” about the meaning of a new statute, as was the case in *Brunner*.²⁰⁴

The Board also rejected the Department’s use of *Public Utilities Commission*.²⁰⁵ While the case upheld the protection of certain internal deliberations of the PUC in a challenge to new regulations, the PUC functions as both regulator and quasi-judicial trier of fact.²⁰⁶ In contrast, the EHB is the independent quasi-judicial branch of Pennsylvania’s environmental governing bodies.²⁰⁷ It is not part of a combined executive/judicial administrative entity.²⁰⁸

198. *See id.* (calling e-mails works of apology rather than development of interpretation).

199. *See id.* at *5 (emphasizing lack of interpretive development in e-mails).

200. *See id.* at **5-13 (containing legal and policy matters analysis).

201. *See id.* at **6-7 (finding e-mails did not meet legal and policy matters predicate).

202. *See WMI II*, 2005 WL 3872354 at *6 (finding specificity of e-mails to site factored into lack of legal or policy matters in e-mails).

203. *See id.* at **6-7 (reiterating *WMI I* opinion).

204. *See id.* (contrasting *Waste Management* litigation to *Brunner*). The Board’s discussion in *WMI I*, that under the EHB Act a department decision is not technically final until the aggrieved party has an opportunity for a de novo due process trial before the Board, was not meant to put the e-mails into the pre-decisional category. *See id.* at *10. The Board made this notation in *WMI I* as a reason “the privilege should not be read in the context of litigation under the [EHB Act] to apply to communications . . . which are specifically and exclusively on the very matter which is subject to review pursuant to the [EHB Act].” *Id.*

205. *See id.* at **10-11 (citing *Pennsylvania v. Pub. Util. Comm’n*, 331 A.2d 598 (Pa. Commw. Ct. 1975)) (rejecting DEP reliance on case involving different administrative setup compared to DEP and EHB).

206. *See WMI II*, 2005 WL 3872354 at **10-11 (noting PUC system is not like three-part environmental regulation system set up by EHB Act).

207. *See id.* at *11 (quoting 35 PA. STAT. ANN. § 7513(a)) (explaining EHB’s independent judicial role).

208. *See id.* at **10-11 (distinguishing role of PUC). The Board also declined to agree with the DEP’s use of *Rupert v. United States*, 225 F.R.D. 154 (M.D. Pa. 2004), where the privilege applied because the government document made a rec-

When the DEP makes an executive decision, the EHB is “open to review [a DEP] decision with all [of] the due process guarantees.”²⁰⁹ In sum, the clear statutory separation between the EHB and DEP particularly mandates that the EHB provide complete de novo review because it is not reviewing decisions made within a combined administrative department.²¹⁰ The Board found the DEP’s citation of this case to be irrelevant to the deliberative process privilege issue.²¹¹

The Board then applied the balancing test.²¹² The Board found WMI’s interest in the e-mails greatly outweighed the DEP’s interest in keeping the e-mails confidential.²¹³ The e-mails were relevant because they discussed the application of a regulation with respect to a particular landfill.²¹⁴ The communications rated not only “one-hundred percent on the relevancy scale,” they also rated “one hundred percent on the importance scale.”²¹⁵ As explained in *WMI I*, for the Board to give *NARCO* deference to the Department’s interpretation of the regulation, the Board itself needed access to all relevant probative evidence, including the e-mails.²¹⁶

V. CRITICAL ANALYSIS

The Board properly applied the deliberative process privilege analysis to determine whether to conduct in camera review in *WMI*

ommendation on a matter which was not yet final; thus the communication was pre-decisional. The Board agreed that a communication must be pre-decisional to fall within the privilege, but the parties took as a given that the e-mails were pre-decisional and so that demarcation was not an issue in the case. *See id.* at **8-9 (citing *Rupert v. United States*, 225 F.R.D. 154 (M.D. Pa. 2004)).

209. *See id.* at *11 (distinguishing relationship between DEP and EHB compared to commingled administrative and judicial roles of other departments).

210. *See id.* (citing *Pennsylvania Trout v. Dep’t of Envtl. Prot.*, 863 A.2d 93, 106 (Pa. Commw. Ct. 2004)) (emphasizing de novo nature of EHB review).

211. *See WMI II*, 2005 WL 3872354 at *10 (finding *Public Utilities Commission* inapposite to *WMI II* issue).

212. *See id.* at *12 (applying balancing test).

213. *See id.* at *13 (finding need for e-mails outweighed any claim of privilege).

214. *See id.* (explaining relevancy of e-mails).

215. *See id.* (describing relevant contents of e-mails).

216. *See WMI II*, 2005 WL 3872354 at **14-15 (citing *Joseph J. Brunner, Inc. v. Dep’t of Envtl. Prot.*, EHB Docket No. 2002-304-L, slip. op. at 5, 2004 WL 817746, at **3-4 (Pa. Env. Hrg. Bd. Apr. 6, 2004); *WMI I*, EHB Docket No. 2004-236-K, 2005 WL 3872353, at **13-14 (Pa. Env. Hrg. Bd. Feb. 14, 2005)) (corrected copy issued Feb. 15, 2005) (explaining how *NARCO* deference fits into need to present full evidentiary record). The *WMI I* Board explained: “In other words, the more work the Department wants *NARCO* to do in terms of providing weight or deference to its interpretation of the regulation, the more probative evidence about the Department’s interpretation of the regulation becomes.” *WMI I*, 2005 WL 3872353 at *14.

178 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

I and properly allowed discovery of the e-mails in *WMI II*.²¹⁷ When the deliberative process balancing test is correctly applied, it is possible to find that a non-government party does need privileged materials.²¹⁸ When courts discount the essentiality of the balancing step, however, its mechanized yet flexible qualities disappear and the likelihood that a court will find a party needs privileged materials decreases.²¹⁹

In the collective *Waste Management* decisions, the Board did not ignore the importance of preventing an intra-agency “chilling effect,” and it did not fail to acknowledge *Kaiser Aluminum* and other cases that established the essentiality of the privilege to a functioning government department.²²⁰ The Board, however, rightly tempered the strength of the deliberative process privilege in order to protect a party’s right to access probative evidence.²²¹ In doing so, the Board differentiated between preventing a “chilling effect” and permitting a form of privilege that disallows *any* access to administrative decision-making by the permittee or the reviewing court.²²²

When an individual permittee must try to present its case in the face of *NARCO* deference, “the evidence becomes . . . extremely highly relevant and . . . extremely highly important.”²²³ In *Waste*

217. See *WMI I*, 2005 WL 3872353 at **6-15 (setting forth deliberative standard and applying it to facts of case); *WMI II*, 2005 WL 3872354 at *18 (compelling production of three e-mails).

218. See Wetlaufer, *supra* note 5, at 892 (noting effects of deliberative process privilege on private litigants). The author notes:

One might object and say that, because this is a qualified privilege and the courts take [effects on private litigants] into account, it does not operate in a way that affects the outcome of litigation. But this assumes that the only discovery that *matters* is that discovery which the party seeking it could, prior to discovery, demonstrate to be particularly important.

Id.

219. See *id.* (noting diminished rights of individual litigants under assertion of privilege). Wetlaufer notes the effects on individual litigants include: “a diminished likelihood that the individual will win a case that, absent the privilege, would have been decided in her favor . . . and, in the event she loses, a diminished sense that she has been treated fairly by the system.” *Id.*

220. See *WMI I*, 2005 WL 3872353 at *9 (citing *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 947 (Ct. Cl. 1958)) (reviewing important elements of privilege).

221. See, e.g., Wetlaufer, *supra* note 5, at 892-93 (noting that deliberative process privilege may deprive citizens of needed information).

222. See *WMI II*, 2005 WL 3872354 at **14-15 (quoting *Joseph J. Brunner, Inc. v. Dep’t of Envtl. Prot.*, EHB Docket No. 2002-304-L, slip op. at 5-7, 2004 WL 817746, at **3-4 (Pa. Env. Hrg. Bd. Apr. 6, 2004)) (explaining that DEP interpretation of statute may be needed by EHB to determine correctness of that interpretation).

223. See *id.* at *15 (explaining how *NARCO* deference heightens importance of every available piece of evidence). The Board stated: “For the Department to use *NARCO* and then be able to hide evidence of DEP’s interpretation of the regu-

Management and in all cases before the EHB, neither the permittee nor the EHB should have to limit their evidentiary review to the DEP's statement of its interpretation of a statute or code section.²²⁴ Rather, the EHB should be allowed access to deliberative materials so it understands to what information it is deferring, and the permittee should have access in order to effectively present its position to the Board.²²⁵

The Board's application of the deliberative process privilege test withstands the DEP's argument that the EHB misapplied the test.²²⁶ In its Commonwealth Court Brief on Petition for Review of the Order of the EHB, the DEP argued the Board incorrectly found the "legal and policy matters" portion of the test included only deliberations about generally-applied policies but not to deliberations about an individualized permit application.²²⁷ The DEP felt there was no precedent and no justification for excluding individualized deliberative decisions from deliberative protection.²²⁸

The *WMI I* decision is weak because of the lack of case law supporting the position that "legal or policy matters" do not include documents relating to individually adjudicated agency deci-

lation creates a very unfair set of circumstances. In short, *WMI*, the Board and the people of this Commonwealth are being told, 'heads I win, tails you lose.'" *Id.*

224. *See id.* at *14 (quoting *Joseph J. Brunner, Inc. v. Dep't of Env'tl. Prot.*, EHB Docket No. 2002-304-L, slip. op. at 5 n.2, 2004 WL 817746, at *3 n.2 (Pa. Env. Hrg. Bd. Apr. 6, 2004)) (emphasizing that because Department interpretation is itself evidence, petitioner has interest in its disclosure). As stated in *Brunner II*, "it would seem that the more weight the Department's position is entitled to, the greater its probative value." *Brunner II*, 2004 WL 817746 at *3 n.2.

225. *See id.* at *15 (noting *NARCO* did not answer what constitutes DEP "interpretation" of regulations that are central to disputes between DEP and litigants).

226. *See* Brief of Petitioner at 18, *Dep't of Env'tl. Prot. v. Waste Mgmt. Disposal Servs. of Pa.*, No. 0422 CD 2005 (Pa. Commw. Ct. May 13, 2005) (arguing against EHB "claim" that it can probe "mental processes" of administrators in individual decisions as opposed to general regulatory matters). *But see* Brief of Respondent at 15-19, *Dep't of Env'tl. Prot. v. Waste Mgmt. Disposal Servs. of Pa.*, No. 0422 CD 2005 (Pa. Commw. Ct. May 19, 2005) (finding EHB did not use "legal or policy matters" to sweepingly exclude every document relating to an individual petitioner).

227. *See* Brief of Petitioner, *supra* note 226, at 11 (finding no basis for EHB distinction between individual and broadly-impacting Department decisions in deciding whether to apply deliberative process privilege). *But see* Brief of Respondent, *supra* note 226, at 18 (arguing that under DEP's interpretation of legal or policy matters little or nothing is left for review on permit appeal).

228. *See* Brief of Petitioner, *supra* note 226, at 18 (arguing that under EHB analysis all deliberations would be exposed to scrutiny by any person or judge since "vast majority" of DEP decisions involve individual case decisions rather than state wide regulatory decisions). *But see* Brief of Respondent, *supra* note 226, at 18 (Pa. Commw. Ct. May 19, 2005) (arguing that under DEP interpretation of legal or policy matters few documents would be protected by deliberative process privilege).

180 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

sions.²²⁹ The EHB primarily refers to other EHB decisions, including *Brunner I* and *Brunner II*, for its position on this matter.²³⁰ The appellate courts, however, lack sufficient common law in this area, making the *Waste Management* reliance on EHB decisions practical if not completely strong.²³¹

As the Board noted, it appeared the e-mails did nothing to develop the DEP's interpretation of the runway exclusion; if they had, the e-mail discussions would have been about "legal or policy matters."²³² While no case law specifically states that "legal or policy matters" do not include individualized adjudicative decisions, case law certainly does discuss the need to protect an individual's due process rights.²³³ The Board, therefore, gave proper weight to due process access to the DEP e-mails where no existing precedent includes individualized application of law as part of protected "legal and policy matters."²³⁴

Examining the issue in terms of due process, the Board correctly recognized that the privilege should be reserved for generalized administrative decisions.²³⁵ An overbroad interpretation of "legal or policy matters" could prevent a person's access to government documents specifically about him or her.²³⁶ As the Board stated, the scope of the privilege claimed by the Department was "breathtaking."²³⁷ "It is one thing," warned the Board, "to say that

229. See generally *WMI II*, EHB Docket No. 2004-236-K, 2005 WL 3872354 (Pa. Env. Hrg. Bd. Feb. 22, 2005) (citing EHB cases for support of position on legal or policy matters predicate).

230. See *WMI I*, EHB Docket No. 2004-236-K, 2005 WL 3872353, at **10-11 (Pa. Env. Hrg. Bd. Feb. 14, 2005) (corrected copy issued Feb. 15, 2005) (noting that privilege, if it exists, must be construed in light of EHB Act, including focused rather than "maximalistic" view of "legal or policy matters" predicate).

231. See *id.* at *11 (noting that DEP's expansive interpretation of "legal and policy matters" would eliminate due process rights under EHB Act).

232. See *id.* (noting possibility that opinions of general application could be interspersed with individualized opinions).

233. See Brief of Respondent, *supra* note 225, at 23 (Pa. Commw. Ct. May 19, 2005) (arguing real "public interest" is not secrecy but transparency in municipal waste permitting).

234. For a discussion of the legal and policy matters predicate, see *supra* notes 199-204 and accompanying text.

235. See *WMI I*, 2005 WL 3872353 at **10-14 (showing importance of final balancing step by emphasizing importance of e-mail to WMI because "runway flight path exclusionary criteria" is central to case).

236. See *id.* at *11 (emphasizing importance of due process rights in EHB setting under EHB Act).

237. See *id.* at *7 (finding DEP's claim to deliberative process privilege "all encompassing"); but see Brief of Petitioner, *supra* note 226, at 18 (stating that there is no reason to support EHB's claim that it may "probe into the mental processes" of administrators in individualized context as opposed to "Commonwealth-wide regulatory impact decisions").

there ought to be a deliberative process privilege, but it is another to say that it ought to be all-encompassing”²³⁸

In its brief to the commonwealth court, the DEP also argued that the EHB overstepped its authority to review DEP decisions.²³⁹ Although the DEP maintained the EHB did not have the “sweeping” right to overrule, in *WMI II* the Board simply maintained that its job is to conduct fair trials and protect individual rights, never asserting an unrestrained overruling power.²⁴⁰ The difference in viewpoint between the DEP and EHB is akin to focusing on the constitutional separation of powers concept rather than the due process privilege.²⁴¹

The EHB uses a de novo standard to review DEP decisions about an individual’s right to proceed with a permit, duty to pay fees or another individualized administrative decision.²⁴² Although different from a criminal proceeding in substance, the EHB trial process is similar in that it is an adjudication of individual rights.²⁴³ While the EHB process is also unlike the special presidential/criminal circumstances of *Nixon*, the final step of the deliberative process privilege test, where an individual’s need for evidentiary materials can outweigh the government’s claim of confidentiality, reminds a

238. See *WMI I*, 2005 WL 3872353 at *7 (disagreeing strongly with proposition that all deliberations on part of DEP are protected in wide scope). *Contra* Brief of Respondent, *supra* note 226, at 27 (arguing WMI and EHB could still address ultimate question of DEP’s interpretation of regulation without e-mails).

239. See Brief of Petitioner, *supra* note 226, at 18-19 (disagreeing with EHB’s argument that under EHB Act no adverse DEP action is final until de novo EHB hearing).

240. See *id.* at 19 (finding EHB “assertion” that case-specific emails are not “legal and policy matters” to be based on erroneous notion that EHB has role of decision-maker).

241. See *City of Colorado Springs v. White*, 967 P.2d 1042, 1047-48 (Colo. 1998) (distinguishing justifications for deliberative privilege). The position of the DEP seems to fit within the constitutional argument for privilege rather than the “fish bowl” justification. See *id.*

242. See 35 PA. STAT. ANN. § 7514 (establishing jurisdiction of Board). Board jurisdiction includes: “[t]he power and duty to hold hearings and issue adjudications under 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) on orders, permits, licenses or decisions of the department.” *Id.* § 7514(a).

243. See *id.* § 7514(c) (continuing jurisdiction standards). The section reads:

The department may take an action initially without regard to 2 Pa.C.S. Ch. 5 Subch. A, but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board under subsection (g). If a person has not perfected an appeal in accordance with the regulations of the board, the department’s action shall be final as to the person.

Id.

182 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151

court to adhere to its responsibility to conduct a trial on full, fair evidence.²⁴⁴

The basic differences between the type of policymaking conducted by the Secretary of Agriculture in *Morgan* and the decision whether to issue a landfill permit in *Waste Management* should also be noted, especially in light of the DEP's argument that the EHB has no right to "probe into the mental processes of administrators in the context of an individual case decision."²⁴⁵ *Morgan* involved communications to the Secretary of Agriculture, while *Waste Management* involved communications between localized decision-making authorities.²⁴⁶ The Secretary's decision in *Morgan* impacted an entire industry at once, while *Waste Management* involved a particular permit rejection pertaining to a singular DEP applicant.²⁴⁷ An

244. See *United States v. Nixon*, 418 U.S. 683, 706 (1974) (noting separation of powers was not meant to "operate with absolute independence").

245. See Brief of Petitioner, *supra* note 226, at 17-18 (Pa. Commw. Ct. May 13, 2005) (citing *Commonwealth v. Vartan*, 733 A.2d 1258, 1265 (Pa. 1999)) (finding EHB position on legal or policy matters based upon "bald assertions"). In the portion of *Vartan* cited by the DEP in its brief, the commonwealth court's reference to "mental processes" reflects its notation that many intermediate courts in Pennsylvania have followed *United States v. Morgan*, 313 U.S. 409 (1941) "by holding that the deliberations of public officials are not subject to discovery." *Vartan*, 733 A.2d at 1265 (citing cases following *Morgan*). It is important to note that *Vartan* protected the deliberations of Chief Justice Nix based on what it called the "deliberative process privilege." *Id.* at 1263. Protecting a former member of the Pennsylvania Supreme Court has the "agency head" aspect of *Morgan* which first protected the mental processes of the Secretary of Agriculture. *Id.* (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)). While *Vartan* cites Pennsylvania cases following *Morgan*, these decisions reflect the imprecise use of *Morgan*: the "chilling effect" is the traditional lower-level justification for administrative privilege. While *Morgan* provides essential privilege principles, its indiscriminate use by many courts blurs decision-makers' "mental processes" with "deliberative process" documents and allows the DEP to use the case to argue in *Waste Management* for the privilege to apply to e-mails created by the Southeast Regional Office Waste Manager and directed to (1) the Deputy Secretary for Field Operations or (2) the Department representative on the Pottstown Landfill Closure Committee, carbon copied to the Deputy Secretary. See *Waste Mgmt. Disposal Servs. of Pa., Inc. v. Dep't of Env'tl. Prot.*, EHB Docket No. 2004-236-K, 2005 WL 3872353, at **2-3 (Pa. Env. Hrg. Bd. Feb. 14, 2005) (corrected copy issued Feb. 15, 2005).

246. See *Morgan v. United States*, 298 U.S. 468, 475-76 (1936) (describing Secretary's delegation of reasonable livestock rates to Acting Secretaries); but see *WMI II*, EHB Docket No. 2004-236-K, 2005 WL 3872354, at **6-9 (Pa. Env. Hrg. Bd. Feb. 22, 2005) (describing writers, recipients and contents of e-mails). See also Brief of Petitioner, *supra* note 226, at 10 (referring to e-mail communications as "high-level").

247. See *Morgan*, 298 U.S. 468, 471 (1936) (explaining that case consolidated fifty different suits on price-fixing issue); but see *WMI II*, 2005 WL 3872354 at **3-4 (noting e-mails deliberated on specific question of whether airport runway exclusionary criteria applied in this particular case). As the EHB stated, "[t]hese e-mails are works of apology (apology in its classic meaning, i.e., defense of, or reasoned statement in argument of, not meaning contrition for) of an interpretation, not

industry-wide, nationwide or generalized policy decision is quite different from the situation of an individual or entity that receives a citation in the mail, or the petitioner who needs to know how the DEP decided its case so that it can make a positional argument on appeal to the Board.²⁴⁸ These differences suggest the need for a more narrowly tailored deliberative process privilege in the EHB setting, given the personally targeted procedure inherent to DEP permitting and violation citation.²⁴⁹

VI. CONCLUSION

Pennsylvania is overdue for a dénouement to its ongoing deliberative process privilege play. Because *Waste Management* went to trial without a resolution by the commonwealth court on the asserted deliberative process privilege, the judiciary unfortunately lost an opportunity to state the privilege's application in the context of an EHB trial in contrast to administrative hearings in different state administrative departments.²⁵⁰ Available case law and the definitions section of the RTKA show that the deliberative process privilege in Pennsylvania appears widely accepted although not officially adopted.²⁵¹ Looking only at the facts of the cases dealing with the issue, it can be said that the privilege applies to former judges, as in *Vartan*, and to many items requested through the RTKA, as exemplified in *LaValle* and *Tribune-Review*.²⁵² Whether the privilege applies with equal force in the context of the EHB, however, remains unsettled.²⁵³

the development of an interpretation," thus applying solely to this applicant. *Id.* at *4.

248. See *WMI I*, 2005 WL 3872353 at *10 (describing DEP decision-making information as part of Appellant's right).

249. *Contra* Brief of Petitioner, *supra* note 226, at 23-28 (arguing disclosure of "internal deliberations" not necessary for due process).

250. See *Waste Mgmt. Disposal Servs. of Pa., Inc. v. Dep't of Env'tl. Prot.*, EHB Docket No. 2004-236-K, 2005 WL 3872378, at *2 n.1 (Pa. Env. Hrg. Bd. May 18, 2005) (explaining circumstances of dropped deliberative process privilege issue within adjudication dismissing WMI's appeal).

251. See, e.g., *WMI I*, 2005 WL 3872353 at *5 (relying on commonwealth court's adoption of deliberative process privilege).

252. See *Commonwealth v. Vartan*, 733 A.2d 1258, 1263 (Pa. 1999) (finding support in deliberative process privilege theory); *LaValle v. Office of Gen. Counsel for the Commonwealth*, 769 A.2d 449, 454-55 (Pa. 2001) (interpreting RTKA exception); *Tribune-Review Publ'g Co. v. Dep't of Cmty. and Econ. Dev.*, 859 A.2d 1261, 1269 (Pa. 2004) (declining to adopt deliberative privilege); *Tribune-Review Publ'g Co. v. Dep't of Cmty. and Econ. Dev.*, 814 A.2d 1261, 1263-64 (Pa. Commw. Ct. 2003) (adopting deliberative process privilege).

253. See *WMI I*, 2005 WL 3872353, at *6 (Pa. Env. Hrg. Bd. Feb. 14, 2005) (corrected copy issued Feb. 15, 2005) (assuming deliberative process privilege exists without solving question).

184 VILLANOVA ENVIRONMENTAL LAW JOURNAL [Vol. XVIII: p. 151]

Waste Management is controversial for its assertion of individual rights in the face of some precedent favoring the government's right to confidentiality of certain deliberative documents.²⁵⁴ The EHB and DEP will continue to disagree over the application of the deliberative process privilege because of its role in establishing the extent to which the EHB can review the DEP and its role in framing the scope of due process afforded an environmental petitioner.²⁵⁵ On appeal to the commonwealth court on this issue, the DEP argued that *none* of its documents would remain privileged under *WMI II*.²⁵⁶ As long as the Department has made an official interpretation of the relevant regulation or statute, however, mere debates between lower-level or intermediate-level officials should be discoverable.²⁵⁷

When the opportunity arises, the Pennsylvania Supreme Court should distinguish between deliberative processes conducted at very high levels of an agency from processes conducted at lower levels.²⁵⁸ The court should also be skeptical of the use of the "chilling effect" justification for the privilege when information sought to be protected directly impacts a stand-alone litigant.²⁵⁹ Most importantly, the Pennsylvania Supreme Court should consider the administrative setup of the EHB and DEP as compared to administrative agencies that both execute regulations and function as quasi-judicial bodies.²⁶⁰

Megan E. Shutte

254. See *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958) (establishing modern deliberative process privilege theory of government protection).

255. See Brief of Respondent, *supra* note 226, at 18 (arguing that DEP's view of deliberative process privilege "legal and policy matters" predicate leaves little or nothing for EHB to review in permit appeal).

256. See Brief of Petitioner, *supra* note 226, at 25-26 (setting forth "deference" argument emphasizing rights of Department).

257. *WMI II*, 2005 WL 3872354 at **6-12 (discussing "legal and policy matters" predicate).

258. See *Tribune-Review Publ'g Co. v. Dep't of Cmty. and Econ. Dev.*, 859 A.2d 1261 (Pa. 2004) (declining to adopt deliberative process privilege in 2004).

259. *Contra LaValle v. Office of Gen. Counsel of the Commonwealth*, 769 A.2d 449, 461 (Pa. 2001) (Cappy, J. concurring) (stating belief of need to adopt deliberative process privilege because of "chilling effect" without it).

260. See 35 PA. STAT. ANN. § 7511 (describing unique setup of Pennsylvania environmental administration).